



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street
San Francisco, CA 94105-3901

February 27, 1997

Hon. Spencer T. Nissen
Office of Administrative Law Judges
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

RE: CATALINA YACHTS, INC.
Docket No. EPCRA-09-94-0013

Dear Judge Nissen:

Pursuant to the applicable provisions of the "Consolidated Rules" (40 CFR §22.25, §22.26), I hereby provide the completed transcript in the above named case. A copy of the transcript is being mailed this day to your office. In addition, one copy is being hand delivered to Counsel for EPA.

Pursuant to the Consolidated Rules, Respondent may purchase copies of the transcript from the court reporter [Hill Reporting Service; 353 Sacramento Street, Suite 600; San Francisco, CA 94111; Phone: (415)-989-4363].

NOTE: Please be aware that a correction was made to page 133 in the transcript. The corrected page along with a copy of the court reporter's cover letter are attached.

Sincerely,

Steven Armsey
Steven Armsey
Regional Hearing Clerk

cc>D.Jones
E.Nottoli

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UNITED STATES

ENVIRONMENTAL PROTECTION AGENCY

ENVIRONMENTAL PROTECTION AGENCY

**REGION IX
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REGION 9

In re:

CATALINA YACHTS, INC.,

Respondent,

ORIGINAL

**Docket No. EPCRA-
09-94-0015**

PROCEEDINGS OF JANUARY 28, 1997

BEFORE THE HONORABLE SPENCER T. NISSEN

**FEDERAL COURT
450 GOLDEN GATE AVENUE
SAN FRANCISCO, CALIFORNIA**

REPORTED BY:

KAY C. HILL, CSR, CM

CSR #2368

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1 THE COURT: We will open the hearing in the
2 matter of California (sic) Yachts, Inc., Docket No.
3 EPCRA-09-94-0015.

4 My name is Spencer Nissen.

5 MR. JONES: I think you misspoke, your
6 Honor, you said California Yachts, I think you meant
7 Catalina.

8 THE COURT: I misspoke then, it is Catalina
9 Yachts.

10 My name is Spencer Nissen. I am an
11 Administrative Law Judge assigned to decide this case.

12 Will the parties please enter their
13 appearances for the Complainant.

14 MR. JONES: I am David M. Jones, Region 9,
15 U.S. EPA, Assistant Regional Counsel.

16 THE COURT: For the Respondent.

17 MR. MEEDER: James Meeder and Eileen Nottoli
18 appearing on behalf of Respondent Catalina Yachts.

19 THE COURT: This proceeding under Section
20 325 of the Emergency Planning and Community
21 Right-To-Know Act of 1986, (EPCRA), 42 U.S. C Section
22 11045, was commenced by the filing of a complaint on
23 June 20, 1994, charging Respondent, Catalina Yachts,
24 Inc., (Catalina), with failing to file complete and
25 correct Toxic Chemical Release Inventory Reporting

1 Forms ("Form Rs") with the Administrator and the State
2 of California as required by EPCRA Section 313 and 40
3 CFR Section 372.30. The alleged failures included
4 failing to report acetone for the years 1988 and 1989,
5 and failing to report styrene for the years 1988
6 through 1992. For these alleged violations, it was
7 proposed to assess Catalina a penalty totaling
8 \$175,000.

9 Catalina answered, admitting that it was the
10 owner or operator of a plant in Woodland Hills,
11 California, and thus of a "facility" as defined by the
12 Act, and that this facility was in Standard Industrial
13 Classification, (SIC) Code 3732 and that it employed
14 more than ten "full-time employees" as that term was
15 defined in 40 CFR Section 372.3. In short, Catalina
16 admitted that it was subject to the Act. Catalina also
17 admitted that it used acetone as a cleaning agent at
18 its facility during the years 1988 and 1989 and that it
19 processed products containing styrene at its facility
20 during the years 1988 through 1992, inclusive.
21 Catalina asserted, however, that it was unable to
22 determine whether it processed or otherwise used
23 acetone and styrene in excess of threshold quantities,
24 that is, 10,000 pounds for chemicals "otherwise used"
25 and 75,000 for chemicals processed in 1988, 50,000

1 pounds for chemicals processed in 1989, and 25,000
2 pounds for chemicals processed thereafter, and
3 therefore denied any obligation to file "Form Rs."
4 Catalina requested a hearing to contest the alleged
5 violations and the proposed penalty.

6 Thereafter, Complainant filed a motion for an
7 accelerated decision as to liability. Respondent to
8 the motion, Catalina, acknowledged that it used resins
9 which contained more than 25,000 pounds of styrene in
10 each year from 1988 through 1992 and that it used more
11 than 10,000 pounds of acetone in 1988 and 1989.

12 Catalina also acknowledged that it failed to file Form
13 Rs for styrene during the period 1988 through 1992 and
14 for acetone for the years 1988 and 1989. Although
15 these admissions would not establish liability for the
16 years 1988, 1989 and 1990, if styrene were "processed"
17 as distinguished from "otherwise used," Complainant's
18 motion for an accelerated decision was granted based on
19 these admissions by an order, dated January 10th, 1995.
20 Catalina raised circumstances which it contended should
21 be considered in mitigation of the penalty, and the
22 mentioned order specified that the amount of the
23 penalty remained at issue and would be decided after a
24 hearing, if necessary.

25 This hearing will be conducted in accordance

1 with the Consolidated Rules of Practice Governing the
2 Administrative Assessment of Civil Penalties, 40 CFR
3 Part 22. The Complainant has the burden of
4 demonstrating that the penalty sought is appropriate
5 and will present its evidence first. Witnesses will be
6 sworn and subject to direct and cross-examination in
7 the usual manner. After Complainant has presented its
8 evidence, Respondent will have an opportunity to
9 present its case. Factual matters in dispute will be
10 decided by a preponderance of the evidence.

11 Under the rules applicable to this
12 proceeding, Respondent must make its own arrangements
13 with the reporter for a copy of the transcript. Upon
14 receipt of a copy of the transcript or notification of
15 its availability -- that is a connotation by the
16 Regional Hearing Clerk -- each party will have 45 days
17 in which to submit proposed findings of fact,
18 conclusions of law and a brief in support thereof.
19 After receiving the submission of the opposing party,
20 each party will have 30 days in which to submit a reply
21 brief. Upon the completion of briefing, this matter
22 will be ready for decision. Any decision I render will
23 be an initial decision, which unless appealed in
24 accordance with Rule 22.30, or unless the Environmental
25 Appeals Board elects, sua sponte, to review the same

1 will become the final decision of the Agency.

2 At a pre-hearing conference this date, the
3 ALJ granted Respondent's motion to strike proposed
4 verified statements, proposed verified statements of
5 Mr. Gregory Gholson and Ms. Ann Miller for the reason
6 that essentially these statements were ruled to be not
7 relevant.

8 And No. 2 -- that order should be reversed --
9 the statements were not distributed to opposing counsel
10 in a timely manner in advance of the hearing.

11 And, Mr. Jones, you may have an automatic
12 exception to that ruling.

13 MR. JONES: Thank you, your Honor.

14 THE COURT: Off the record.

15 (Discussion off the record.)

16 THE COURT: You may make an opening
17 statement or call your first witness, Mr. Jones.

18 MR. JONES: Your Honor, our first witness is
19 Dr. Pam Tsai. And we have submitted her direct
20 testimony by verified statement.

21 THE COURT: Ms. Tsai.

22 Do you have any objection to taking an oath?

23 THE WITNESS: No.

24 PI-YUN "PAM" TSAI,
25 having been duly sworn, testified as follows:

1 THE COURT: And we will call Ms. Tsai's
2 declaration Complainant's Exhibit A.

3 MR. JONES: Your Honor, having submitted our
4 direct testimony in accordance with 22.22(c), Dr. Tsai
5 is now available to Respondents for cross-examination.

6 THE COURT: Well, I would suggest,
7 Mr. Jones, that you ask the witness to identify herself
8 and ask her whether this is, in fact, her testimony,
9 and whether she adopts it, whether there are any
10 corrections she wishes to make in it, and then at that
11 point turn it over to Mr. Meeder for cross-examination.

12 MR. JONES: Thank you, your Honor.

13
14 DIRECT EXAMINATION BY MR. JONES

15 Q. Dr. Tsai -- if I may approach the witness?

16 THE COURT: Yes, you may.

17 MR. JONES: Q. I hand you a document.
18 Will you take a look at that document.

19 Is that your declaration?

20 A. It is.

21 Q. Is the signature at the end of the document
22 your signature?

23 A. Yes, it is.

24 MR. JONES: Your Honor, I would ask that
25 this declaration be admitted as Complainants's Exhibit

1 A to the record.

2 THE COURT: And this offer goes to the
3 attachments?

4 MR. JONES: As well as the attachments, yes,
5 sir.

6 THE COURT: Well, I will reserve ruling
7 until Mr. Meeder completes his cross-examination.
8 You may cross-examine now.

9 MR. MEEDER: Your Honor, should I approach
10 the podium and do it from there?

11 THE COURT: You can suit yourself.

12 MR. MEEDER: Thank you.

13

14 CROSS-EXAMINATION BY MR. MEEDER

15 Q. Dr. Tsai, do you have Exhibit A before you?

16 A. You mean Exhibit 1?

17 Q. I mean Exhibit A, which is your declaration,
18 excuse me.

19 A. Yes, I do.

20 Q. Does that exhibit anywhere state that the
21 amount of the penalty EPA has calculated as of today
22 that it is seeking in this proceeding?

23 A. Could you rephrase your question, please?

24 Q. Does your declaration state the amount of the
25 penalty EPA is seeking here today?

1 A. No.

2 Q. Have you been asked to calculate in any way
3 the amount of the penalty EPA is seeking here today?

4 A. Yes.

5 Q. Did you do that?

6 A. Yes, I did.

7 Q. Dr. Tsai, if your declaration -- I am
8 confused a little bit. Does your declaration state the
9 amount of penalty that EPA is here seeking today?

10 A. It does not.

11 Q. Is there a penalty calculation in your
12 declaration?

13 A. It is presented as an exhibit.

14 Q. And what exhibit is that?

15 A. It is Exhibit No. 3.

16 Q. And is Exhibit No. 3 the penalty calculation
17 you made prior to the filing of the Complaint?

18 A. That's correct.

19 Q. Now in making the calculation which is set
20 forth in Exhibit 3 to your declaration, did you in any
21 way consider the penalty factors set forth in 42 U.S. C
22 Section 11045(b)(1)(C)?

23 A. I did.

24 MR. MEEDER: Your Honor, if I could have
25 marked as an exhibit Respondent's first in order, a

1 copy of the statute?

2 THE COURT: We will mark that as
3 Respondent's 1.

4 MR. MEEDER: Very well, your Honor. Should
5 I simply mark it with a number, your Honor?

6 THE COURT: Yes, R-1. And that's a copy of
7 Section 11045?

8 MR. MEEDER: That's correct. I have a copy
9 for the EPA counsel, a copy marked for the witness and
10 a copy marked for the Court.

11 Can I approach the witness?

12 THE COURT: Yes.

13 [Respondent's Exhibit 1 was marked
14 for identification.]

15 MR. MEEDER: And I would like to hand one to
16 the court as well, your Honor.

17 Q. Dr. Tsai, I would like to turn to Page 204,
18 which is really the second page of Exhibit R-1, and
19 direct your attention to (b)(1)(C).

20 Do you see that there?

21 A. Yes, I do.

22 Q. Is there any reference in your declaration to
23 this statutory section?

24 A. There is no reference, but we indicate the
25 fact we considered those factors.

1 Q. What document do you reference in your
2 declaration as controlling your calculations of the
3 original penalty that was assessed or recommended in
4 the Complaint that was filed in 1994?

5 A. We referenced to the Enforcement Response
6 Policy, but we also indicated the fact that we took
7 into consideration other factors identified here.

8 Q. The first factor is the nature of the
9 violation. Do you see that?

10 A. Yes.

11 Q. What do you understand that factor to mean?

12 A. Just the nature of the violation, how the
13 violation was done.

14 Q. Would it be fair to characterize the nature
15 of the violation as the specific kind of violation of a
16 particular section in EPCRA?

17 A. That's correct, that's my understanding.

18 Q. So a failure to file a Form R would be a kind
19 of violation, is that correct?

20 A. That's correct.

21 Q. So in terms of determining the nature of the
22 violation, you considered that the violation that has
23 been charged in the Complaint was a failure to file
24 Form Rs, is that correct?

25 A. That's correct.

1 Q. Now, with regard to the second element in the
2 statute, circumstances of the violation, what does that
3 refer to?

4 A. Again, it is the type of violation that
5 occurred.

6 Q. Is it the same as the nature of the
7 violation?

8 A. In my understanding it is similar.

9 Q. Now in connection with the circumstances of
10 the violation, it is your understanding that when you
11 did the calculation of the penalty, that it is the same
12 as the nature, correct?

13 A. In doing a calculation, there is no component
14 as to the nature, rather there is a six level.

15 Q. So when you did the calculation of the
16 penalty on behalf of EPA, you did not consider the
17 nature of the violation?

18 A. It was not specifically considered, that is
19 correct.

20 Q. Now, with regard to the circumstances of the
21 violation, are you familiar with EPA's Enforcement
22 Response Policy in connection with EPCRA violations?

23 A. Are you referring to the one published in
24 1992?

25 Q. Yes, I am, 1992.

1 A. Yes, I do.

2 MR. MEEDER: Your Honor, if I can at this
3 time, I would like to mark as Respondent's exhibit next
4 in order a copy of that policy.

5 THE COURT: You may.

6 MR. MEEDER: It will be R-2. Before we put
7 Exhibit R-2, which has been marked for identification,
8 in front of the witness, let me hand one copy to the
9 court. If I may approach the bench?

10 THE COURT: Yes, you may.

11 [Respondent's Exhibit 2 was marked
12 for identification.]

13 MR. MEEDER: Q. Would you describe to the
14 court, in your own words, what you understand the
15 statutory language in Exhibit R-1 concerning
16 circumstances of violation to mean?

17 A. Could you repeat that again?

18 MR. MEEDER: Could we have the question read
19 to the witness, please?

20 (The record was read by the reporter as
21 follows:

22 "Question: Would you describe to the court,
23 in your own words, what you understand the
24 statutory language in Exhibit R-1 concerning
25 circumstances of violation to mean?")

1 THE WITNESS: Circumstances that were --
2 indicates different level of violation. And it ranges
3 from failure to report in a timely manner to failure to
4 maintain records, failure to respond to Agency's
5 Notices of Non-compliance, et cetera. So there are
6 different levels of circumstances that we use.

7 In this particular case it is Circumstance
8 Level 1, indicating that it is failure to report in a
9 timely manner, exceeding one year after the due date.

10 MR. MEEDER: Q. Any other factor or
11 explanation of the meaning to you of the phrase
12 "Circumstances of Violation"?

13 A. No.

14 Q. Now, I would like to place before the
15 witness, if I can, a policy, which is R-2.

16 A copy for counsel.

17 And I want to direct your attention,
18 Dr. Tsai, if I can, to Page 8.

19 MR. JONES: Your Honor, I am confused with
20 the second document that I have just been handed, as
21 opposed to the first document. They look like the same
22 thing.

23 MR. MEEDER: Q. Dr. Tsai, I would like to
24 direct your and the Court's attention to Page 8. And
25 at Page 8, there is a paragraph describing what

1 circumstance levels of a matrix take into account.

2 Do you see that, top of the page?

3 A. Yes, I do.

4 Q. And is it your understanding that with regard
5 to EPA, in terms of the circumstances of the violation,
6 it is important to know whether the report is accurate
7 and whether the report has been made available to the
8 community, to the states and to the federal government?

9 A. That's correct.

10 Q. Is it also your understanding with regard to
11 circumstances of violations under the statute, that it
12 is important that the information be made available to
13 the community, to the states and to the federal
14 government?

15 A. That's correct.

16 Q. Did you investigate at any time whether or
17 not any of the information that might appear in a Form
18 R was ever made available to the community surrounding
19 my client, Catalina Yachts's facility?

20 A. It was after the Civil Complaint was issued,
21 we were made aware of the fact that Catalina had
22 submitted certain forms to the fire department in Los
23 Angeles and to the local air district, namely South
24 Coast Air Quality Management District. However, the
25 forms submitted to those agencies are not the same

1 forms which were required by Section 313 of EPCRA. In
2 addition, the content of the forms submitted to the
3 local agencies were not the same.

4 And lastly, the accessibility or availability
5 of the information contained in those forms submitted
6 to the local agencies and are not the same as the
7 information contained in Section 313 of EPCRA.

8 Q. Dr. Tsai, did you review the documents that
9 you just referred to that were filed with the local
10 fire department, as well as the South Coast Air Quality
11 District?

12 A. Yes, I did. Reviewed the ones available to
13 us.

14 Q. And how did they become available to you?

15 A. They were submitted by Catalina Yachts to us.

16 MR. MEEDER: Your Honor, if I might at this
17 time mark for identification Exhibits R-3, 4 and 5,
18 copies of those documents just referred to in the
19 witness's testimony.

20 This is a copy for the Court, R-3, a copy for
21 the Court, R-4.

22 MR. JONES: Counsel, would you identify the
23 document that you have just handed to me?

24 MR. MEEDER: A copy of the L.A. Fire
25 Department letter.

1 MR. JONES: You are asking that to be marked
2 as --

3 MR. MEEDER: R-3.

4 Then R-4 is a South Coast Quality Management
5 Form S for 1988. I will hand that to the Court and
6 give a copy to Counsel.

7 And the last one is an Air Toxics Inventory
8 Report dated October 31, 1991, which has been marked as
9 R-5 to the South Coast Air Quality District, which I
10 will hand to the Court as well as to Counsel.

11 I will at this time, with permission of the
12 Court, approach the witness and place R-3, R-4 and R-5,
13 which have been marked for identification before the
14 witness.

15 THE COURT: You may.

16 [Respondent's Exhibits 3, 4 and 5 were marked
17 for identification.]

18 MR. MEEDER: Q. Dr. Tsai, if you would
19 take a moment and review those documents. And my
20 question to you as you review them is, are these the
21 documents you referred to in your testimony in answer
22 to my last question?

23 A. Yes, they are.

24 Q. Now in connection with R-3, is it your
25 understanding that Catalina Yachts submits a form like

1 this to the L.A. County Fire Department annually?

2 A. I knew that Catalina submits this form to the
3 fire department, I am not aware if annually or not.

4 Q. Did you investigate that in any way?

5 A. I didn't.

6 Q. Did you ever talk to anyone at the L.A. Fire
7 Department about these forms and whether they were on
8 file?

9 A. I did not.

10 Q. So did you or did you not take into account
11 the fact that the L.A. Fire Department received
12 information from Catalina Yachts concerning the
13 chemicals at issue in this case, acetone and styrene,
14 on a regular basis?

15 A. I did not take into account at the time I
16 prepared the Complaint and did a calculation. After
17 the submission or issue of the Civil Complaint, we were
18 made aware of these reports.

19 However, your Honor, I would like to call
20 your attention to the differences of this report versus
21 this information they were required to submit on a
22 Toxics Release Inventory, Section 313 of EPCRA.

23 Your Honor, if you look at the Page No. 3 of
24 the Exhibit R-3, you will notice on your reconcile that
25 it will give you the components of the material used at

1 Catalina Yachts, also give you the CAS numbers on the
2 righthand side -- on the lefthand side, excuse me. It
3 gives you the maximum quantity on-site and the total
4 and yearly quantity used, but nowhere it tells us how
5 much of those chemicals are released into the
6 environment during the course of the operation.

7 In addition, if you look at the one on the
8 righthand side, it will give the chemical names but
9 give you a percentage of those chemicals contained in
10 the materials. We only notice there -- or give you
11 styrene, that is one of the components, give you the
12 percentage contained in the material.

13 THE COURT: I think, Ms. Tsai, you should be
14 answering Mr. Meeder's questions, and then Mr. Jones on
15 the redirect can bring out any of these essential
16 arguments that you are making.

17 So I would just proceed, and you answer Mr.
18 Meeder's questions.

19 MR. MEEDER: Thank you, your Honor.

20 Q. Dr. Tsai, is it your understanding that the
21 Los Angeles County Fire Department needs to know the
22 quantities released for their purposes in terms of
23 their jurisdiction, their obligations?

24 A. My understanding, they do not need to know
25 the releases, they need to know the use of certain

1 chemicals that exceed certain quantities, or they have
2 certain chemicals on the site exceeding certain
3 quantities for preparing for accident or releases.

4 Q. With regard to the Form R requirements, they
5 require you to list certain chemicals beyond certain
6 quantities, don't they?

7 A. Excuse me, I didn't get your question.

8 Q. With regard to the Form R and its
9 requirements, it requires identification of chemicals
10 from the EPA list as well as the quantities at issue,
11 do they not?

12 A. The Form R does identify the chemicals
13 exceeding the threshold quantity, but Form Rs identify
14 the releases over an entire year, including routine
15 releases and accidental releases.

16 Q. Let's go to Exhibit R-4 for a second.

17 Does Exhibit R-4, which is submitted to
18 the -- do you know whether or not this Form S is
19 submitted annually by Catalina Yachts to the South
20 Coast Air Quality Management District?

21 A. My understanding is yes.

22 Q. And let me ask you, by the way, does EPA have
23 any similar requirement for submission regarding air
24 quality management in California today, or is that just
25 the South Coast Air Quality District?

1 A. My understanding, it is to all the districts.

2 Q. So that's the state agency, is that correct?

3 A. This is a local agency, but it is, I think, a
4 state requirement.

5 Q. Does this form contain any information about
6 emissions in it of acetone and styrene?

7 A. This information only contains acetone
8 releases.

9 Q. Does it contain information concerning
10 releases of polyester resin?

11 A. It does.

12 Q. Do you know what polyester resin is made up
13 of, primarily?

14 A. I didn't know that before we received other
15 information.

16 Q. Do you know now?

17 A. Yes.

18 Q. Is it styrene?

19 A. Styrene is part of the component.

20 Q. The major component?

21 A. I am not sure.

22 Q. Now, let's look at R-5 for a second, if I
23 can.

24 Can you identify this document for the Court?

25 A. It is addressed to South Coast Air Quality

1 Management District. "Attention: Toxics Unit,
2 Engineering Division. Subject: Air Toxics Inventory
3 Report for Catalina Yachts."

4 Q. Now, are you familiar with Air Toxics
5 Inventory Reports in California?

6 A. Yes.

7 Q. And is that a state requirement?

8 A. That's correct.

9 Q. It is not an EPA requirement?

10 A. It is not.

11 Q. And does this Air Toxics Inventory Report
12 contain information about acetone and styrene
13 emissions?

14 I will direct you to the fourth page of the
15 exhibit. Do you see "styrene" at the top?

16 A. It contains styrene, but it does not contain
17 acetone.

18 Q. And why is that, if you know?

19 A. I don't know.

20 Q. Is it possibly because acetone is not a
21 listed chemical which requires reporting to the state
22 South Coast Air Quality Management District?

23 A. I don't know.

24 MR. JONES: Your Honor, I object to further
25 questioning. The witness has said she doesn't know,

1 that should be sufficient.

2 MR. MEEDER: Q. Was knowledge about
3 whether or not the South Coast Air Quality Management
4 District Air Toxics Inventory Report required the
5 reporting of acetone relevant in any way to your
6 evaluation of whether the community received
7 information regarding the two chemicals at issue and
8 the amount of emissions?

9 A. I don't understand your question.

10 Q. Let me withdraw it.

11 Now, going back to this circumstances of the
12 violation, as I understand it from your earlier
13 testimony, what you really did in calculating the
14 circumstances factor of your matrix was you simply
15 determined the nature of the violation, is that
16 correct?

17 A. It's the circumstance.

18 Q. And you defined the circumstance to be the
19 nature of the violation, is that correct?

20 A. It is similar.

21 Q. It is identical, isn't it?

22 A. I am not sure it is identical.

23 Q. Dr. Tsai, if we could for a moment, let's
24 look at Exhibit 3 to Exhibit A of the government, which
25 is your calculus worksheet concerning the total

1 violations.

2 Do you see that?

3 A. Yes.

4 Q. And under "Circumstance Level," you wrote one
5 for each of the seven violations at issue here today,
6 is that correct?

7 A. That's correct.

8 Q. And if we go to Exhibit R-2, which is the
9 Enforcement Response Policy, and we go to Page 11 --
10 excuse me, not Page 11, but Page 12.

11 And the one on Exhibit 3 to Exhibit A of the
12 Government's corresponds, does it not, to Level 1 on
13 Page 12 of Exhibit R-2? Is that correct?

14 A. That's correct.

15 Q. And, so, when you wrote down the one on
16 Exhibit 3 to Exhibit A, you simply made the
17 determination from Page 12 of the policy that Catalina
18 Yachts failed to report in a timely manner Category I,
19 and, therefore, you gave them a one, is that correct?

20 A. That's correct.

21 Q. And you did not consider that portion of the
22 policy on Page 8, which states that the circumstance
23 levels of the matrix take into account the seriousness
24 of the violation as it relates to the accuracy and
25 availability of the information to the community, to

1 the states and to the federal government, is that
2 correct?

3 A. It concerned the availability of the
4 information to the community. And because the
5 information was not submitted to the government,
6 therefore it was not available to the community.

7 Q. Do you know whether or not the South Coast
8 Air District files are available to the community?

9 A. As far as I understood, it is available to
10 the community, but the community would have to submit
11 information, request the company submit information to
12 the local district under the Brown Act.

13 Q. Do you know whether or not the Air Toxics
14 Inventory is available to the community?

15 A. The way I understood it, the local district
16 published the names of the companies which were under
17 major source, they published that information, a list
18 of companies classified as a major source, but there
19 was not information regarding the chemicals involved or
20 the quantity of release.

21 Q. Is the Air Toxics Inventory, which contains
22 the chemicals and the quantities released, and
23 particularly styrene, in a file open to the public and
24 available to the community at the South Coast Air
25 Quality District?

1 A. You need to submit information request. It
2 is available, but it is not as available as the Section
3 313 information.

4 Q. Now with regard to the information of
5 quantities on-site submitted to the L.A. Fire
6 Department, is that available to the community?

7 A. I believe it is available to the community.

8 Q. Now, is the L.A. County Fire Department the
9 primary agency responsible for enforcement and fire
10 protection in the community surrounding Catalina
11 Yachts?

12 A. I don't work in the fire department, I don't
13 know.

14 Q. Does EPA have any roll in that fire
15 protection around Catalina Yachts?

16 A. It is not in the scope of my work.

17 Q. Is the South Air Coast Management District
18 the agency in California with the primary
19 responsibility for determining the releases of
20 chemicals as well as the quantities released around
21 Catalina Yacht's facility?

22 A. They are responsible for the release
23 permitted to the facility, but some other releases
24 could be not permitted.

25 Q. Does the South Coast Management District

1 represent the community in Southern California around
2 the Catalina Yacht facility?

3 A. The definition of community, I would say they
4 represent the community in a certain way, but in some
5 other instances, the community do have their own right
6 to know.

7 Q. But insofar as air emissions are concerned in
8 Southern California where this facility is located, the
9 South Coast Air Management District has responsibility
10 on behalf of the community to monitor them and control
11 them, does it not?

12 A. I am not working in the local district, so I
13 don't know specifically their responsibility.

14 Q. How about the fire department, do they have
15 responsibility on behalf of the community with regard
16 to fire protection and the fires associated with
17 hazardous chemicals?

18 A. That is my understanding.

19 Q. Now with regard to your matrix, which is
20 Exhibit 3 to Exhibit A of the Government's.

21 The first factor you considered in the
22 calculus of the penalty was this factor called
23 "Circumstance Level," is that correct?

24 A. That's correct.

25 Q. And the second factor was the "Extent Level."

1 Do you see that?

2 A. Yes.

3 Q. And we have already discussed the fact that
4 the Circumstance Level addresses the nature of the
5 violation; i.e., the failure to report, correct?

6 A. Correct.

7 Q. And nothing else, correct?

8 A. What do you mean by nothing else?

9 Q. Well, you didn't consider any other factor
10 when you put the one down, other than the nature of the
11 violation, correct?

12 A. That's correct.

13 Q. Now with regard to the Extent Level, can you
14 describe to the Court what you mean by Extent Level?

15 A. Extent Level was determined based on several
16 factors. One is how much chemicals per year got
17 manufactured, processed, or otherwise used by the
18 company.

19 We also considered two other factors,
20 regarding the size of the company, and this is in terms
21 of how many employees do they have and how much was
22 annual gross sales.

23 Q. And does that come from Exhibit R-2, which is
24 the Enforcement Response Policy, those two factors, the
25 amount of the chemical and the size, with both

1 employees and gross sales as factors?

2 A. That's correct.

3 Q. Anything else you considered in connection
4 with the Extent Level on Exhibit 3 of Exhibit A?

5 A. That's the three main ones.

6 Q. Is there anything else?

7 A. No.

8 Q. Now going back to Exhibit 1, which is the
9 statutory Section 11045(b)(1)(C), which sets forth the
10 statutory provisions with regard to determining the
11 amounts of a penalty that the Administrator is supposed
12 to take into account. You didn't take into account,
13 did you, the gravity of the violation, is that correct?

14 A. I did.

15 Q. What factor is that, where is that on the
16 worksheet, Exhibit 3 to Exhibit A?

17 A. It is not on the sheet, but we considered it.

18 Q. You considered it. And what did you consider
19 about the gravity of the violation and -- let me ask
20 the question again.

21 Why isn't it on Worksheet A?

22 A. Worksheet A is a summary; it is only a
23 summary.

24 Q. But you told us that summary is made up of
25 the following components: The nature of the violation;

1 i.e., no reporting; the amount of the chemical on-site;
2 the size of the company in terms of employees and gross
3 sales. Is that correct?

4 A. This is all preliminary calculation sheet.

5 Q. Have you done any calculations beyond the
6 preliminary calculation sheet?

7 A. We considered them.

8 Q. Do you have a calculation sheet beyond the
9 preliminary calculation sheet?

10 A. We don't.

11 Q. Where is your calculation that went beyond
12 the preliminary calculation sheet?

13 A. There is no calculation because all other
14 factors we considered are not applicable to the
15 modification of the penalty.

16 Q. So with regard to gravity of the violation,
17 EPA considered it, but determined it wasn't applicable
18 to the determination of the amount of the penalty, is
19 that correct?

20 A. That's correct.

21 Q. And with regard to ability to pay, did you
22 consider that in any way?

23 A. We did. In fact, we requested information
24 from Catalina Yachts, and Catalina Yachts declined to
25 submit information.

1 Q. Did you understand the judge ruled on that
2 issue?

3 A. I understood that.

4 Q. And did you consider prior history of such
5 violations but determined that it wasn't applicable?

6 A. That's correct.

7 Q. And did you consider the degree of
8 culpability of Catalina Yachts but determined it wasn't
9 applicable?

10 A. That's correct.

11 Q. And did you consider the economic benefit or
12 savings, if any, resulting from the violation and
13 determined it wasn't applicable?

14 A. We take into consideration during
15 negotiation.

16 Q. Did you consider it in terms of the position
17 of the government here today?

18 A. Pardon me?

19 Q. Did you consider it in terms of the position
20 of the government here today?

21 A. Do I consider the position of the government?

22 Q. Let me ask the question again. I was
23 unclear, and I apologize.

24 Did you consider -- let me ask the question,
25 maybe it is a premise that doesn't belong.

1 You don't know what the Government's position
2 here today is with regard to the appropriate penalty,
3 do you?

4 A. I do.

5 Q. What is it?

6 A. We assess a proposed penalty of \$175,000, and
7 the Government is prepared to offer a 25-percent
8 reduction for the chemical acetone, which was delisted.

9 Q. With regard to economic benefits and savings,
10 if any, resulting from the violation, in doing your
11 calculus of the position of the Government you just
12 stated, did you consider that factor in any way?

13 A. We did not.

14 Q. And with regard to any other matters that
15 justice might require as laid out in the statute, did
16 you consider that in any way?

17 A. As I mentioned, some of the factors were
18 considered only during negotiation for settlement. We
19 did consider, but we did not apply at the time we
20 calculated the proposed penalty.

21 Q. Dr. Tsai, maybe -- I apologize for my
22 question not being clear enough, but we are interested
23 not in the negotiations, what was not proposed, but
24 what is the position of the Government today and what
25 went into that calculation in terms of the factors

1 considered.

2 So as I understand your position, the only --
3 the position of the Government is that the penalty
4 should be a \$175,000 reduced by a 25-percent factor for
5 the acetone violations, which are two, is that correct?

6 A. That's correct.

7 Q. And that position is derived from the
8 Enforcement Response Policy, which is marked as R-2, is
9 that correct?

10 A. That's correct.

11 Q. Now, did EPA in any way consider any
12 voluntary expenditures incurred by Catalina Yachts to
13 benefit the environment?

14 A. In some cases we did, but not in this
15 particular case.

16 Q. Did you make an inquiry of Catalina Yachts
17 with regard to that?

18 A. Catalina Yachts made us aware of the extra
19 expenditures. I cannot recall we saw any specific
20 detailed information.

21 Q. Now with regard to the factor prior history
22 of such violations, which is in the statute, why did
23 EPA dismiss that factor and not adjust the penalty
24 downward with regard to Catalina Yachts's prior history
25 of having no such violations?

1 A. That factor can only be adjusted upward if
2 the company has a history of prior violation.

3 Q. That is in R-2, the policy, isn't it?

4 A. That's in the guidance.

5 Q. It is not in the statute, is it?

6 A. I am not aware of that.

7 Q. With regard to degree of culpability, did EPA
8 consider that in any way in connection with reducing
9 the penalty downward for Catalina Yachts that it is
10 proposing here today?

11 A. Again, that factor is only used to upward the
12 penalty but not downward the penalty.

13 Q. And does that come from the R-2, Exhibit R-2
14 policy of EPA?

15 A. That comes from the exhibit of EPA's
16 guidance.

17 Q. And it is not in the statute, is it?

18 A. I am not aware of it.

19 Q. Now with regard to EPA's policy concerning
20 "Other factors as justice may require," does Region 9
21 use that factor at all?

22 A. We did in some cases.

23 Q. Did you do it in this case?

24 A. No.

25 Q. Now I want to direct your attention, and the

1 Court's attention, to Page 5 of your declaration, which
2 is Exhibit A, Paragraph 9.

3 And it says here, and I quote, The second
4 sentence, "The adjustment for attitude and, quote,
5 'Other factors as justice may require,' close quote,
6 is, by practice in Region 9, considered only in
7 connection with settlement negotiations."

8 Do you see that?

9 A. Yes, I do.

10 Q. Does that refresh your recollection that
11 "Other factors as justice may require," is considered
12 by Region 9?

13 A. Yes, during negotiation.

14 Q. But not during the penalty phase?

15 A. No, not when we propose the penalty.

16 Q. How about here today?

17 A. It was not considered in the proposed
18 penalty.

19 Q. So, is it your understanding that Region 9
20 takes the position that it will not apply such a factor
21 that is required or set forth in the statute?

22 A. We will consider it but not in general
23 practice. We will not take a reduction at the time we
24 propose the penalty.

25 Q. With regard to attitude, what factors are

1 involved in attitude?

2 A. There are two factors: One is a corporation;
3 the other one is compliance.

4 Q. And under the guidance policy with regard to
5 cooperation, if a respondent cooperates with EPA during
6 its investigation, EPA's guidance indicates that a
7 reduction of up to 15 percent of the penalty can take
8 place, is that correct?

9 A. That's correct.

10 Q. But it is Region 9's policy not to follow
11 that policy, is that correct?

12 A. Not to follow that policy when we calculate
13 the proposed penalty, that's correct.

14 Q. And not to follow that policy as you sit here
15 today stating what EPA's position is with regard to the
16 penalty, is that correct?

17 A. EPA's position will consider those.

18 Q. Did it in this case?

19 A. It did not in the proposed penalty.

20 Q. And with regard to -- what was the second
21 factor under attitude, after cooperation?

22 A. Compliance.

23 Q. Does that also have in the EPA policy a
24 15-percent reduction?

25 A. Yes, up to 15 percent.

1 Q. And is it Region 9's position it doesn't
2 follow that portion of the policy when it is in court
3 asserting what the penalty should be against a
4 respondent?

5 A. We consider that, but when we did a
6 calculation for the proposed penalty, we did not take
7 that reduction because the agency was not sure if the
8 company was going to come to compliance.

9 Q. Sitting here today, do you know -- did you
10 investigate in any way whether -- let me rephrase that.

11 Have you investigated yourself in any way
12 whether or not Catalina Yachts cooperated during the
13 investigation?

14 A. My understanding they were.

15 Q. Did you investigate in any way as to whether
16 or not after the November 1993 visit, Catalina Yachts
17 expeditiously complied with the Form R requirements and
18 thereafter filed them?

19 A. EPA inspected Catalina Yachts in November
20 1993. Catalina Yachts submitted the Form Rs in May
21 1994.

22 And somewhere in, I believe it was in April
23 1994, EPA also learned that Catalina Yachts received a
24 Notice of Intent to sue from a citizen group called
25 "Citizens for Better Environment."

1 Q. And thereafter, EPA filed its Complaint for
2 administrative penalties before the 60-day period ran,
3 is that correct?

4 A. The EPA's investigation was independent of
5 the citizens' group, we inspected the facility before
6 the citizens brought a suit.

7 Q. And you filed a complaint before the citizens
8 brought a suit, is that correct?

9 A. I don't remember the date.

10 Q. I think it is June 17, 1994. Does that
11 refresh your recollection on the date the Complaint was
12 filed?

13 A. I remember the dates we filed the Complaint,
14 but I didn't remember the date of the citizens' group
15 letter.

16 Q. Do you know whether or not the Northridge
17 earthquake occurred between the November 1993
18 inspection and the submission of Form Rs in May of
19 1994?

20 A. I don't remember the dates of the earthquake.

21 MR. MEEDER: We will get some testimony on
22 that later, your Honor.

23 Q. Was EPA at all concerned in terms of letting
24 the community know about the chemicals at Catalina
25 Yachts, as well as the emissions, through the Form R

1 process after its inspection in November 1993?

2 A. Yes.

3 Q. And what did it do after its inspection in
4 November of 1993, prior to May 1994, to get that
5 information submitted to EPA, if anything?

6 A. Our inspector sent the forms and the package
7 and the computerized Form R to Catalina Yachts within a
8 week after the inspection. The inspector also
9 contacted the facility many times, prior to another
10 visit in, I believe it was in May to the facility.

11 Q. You said the inspector contacted the facility
12 many times prior to a visit in May. How many times is
13 many times, Dr. Tsai?

14 A. I cannot say how many times. I am not an
15 inspector, I did not make the call.

16 Q. Well, how can you say it was many times if
17 you don't know how many it was?

18 A. It was through my personal conversation with
19 an inspector who was working under my guidance.

20 Q. I would like to direct your attention, if I
21 could, to Exhibit 2 to your declaration, which is
22 Exhibit A, which is the Inspection Report.

23 Does that Inspection Report, which was
24 written on May 26th, 1994, some seven months after the
25 inspection, indicate any contact between EPA and

1 Catalina Yachts after the November 15, 1993 inspection?

2 A. It did not mention.

3 Q. Do you know whether Catalina Yachts retained
4 a consultant to assist them in preparing the Form Rs?

5 A. I was told about that fact, yes.

6 Q. Now, tell the Court, if you can, how a
7 citizen in Southern California, near the Woodland
8 Hills' Catalina Yachts' facility, goes about finding
9 out information concerning the Form Rs filed by
10 Catalina Yachts today, what does a citizen do?

11 A. There are many ways a citizen can get this
12 information. The information is compiled in the
13 national computer database, which can be assessed by
14 any citizen if they have Internet, or they can go
15 through the National Library of Medicine database. And
16 it is also available in CD ROM, which were distributed
17 to federal depository libraries. And we also sent
18 those CD roms to all the university libraries as well.

19 And EPA also published annual reports, this
20 is in annual reports informing the citizens of the
21 releases surrounding their communities.

22 So there are many, many different ways
23 citizens can get access to the TRI report.

24 Q. Are they kept on file in EPA's offices?

25 A. They are compiled in the national database;

1 in other words, all information submitted by the
2 companies were entered into a computer database.

3 Q. Now if I don't have a computer and the
4 software necessary to access the Internet, how do I go
5 about getting information about the Woodland Hills'
6 Catalina Yachts' facility from the EPA?

7 A. You can go to the libraries who have those
8 facilities.

9 Q. Make a request?

10 A. You can make a request to the regional office
11 or make a request to our headquarter office.

12 Q. And that request is similar to the request
13 you might make to the South Coast Air Management
14 District, isn't it?

15 A. It is not.

16 Q. Have you ever made a request of the South
17 Coast Air Management District for information?

18 A. In my other capacity we did. We can get
19 information from the South Coast, but I never requested
20 specific information about the emission.

21 Q. Do you know whether or not Mr. Deviny, the
22 inspector who wrote this inspection report, which is
23 Exhibit 2 to Exhibit A, went to the South Coast Air
24 Management District and reviewed Catalina Yachts'
25 facility data?

1 A. I am not aware that Mr. Deviny went to the
2 South Coast Air Management District and reviewed the
3 file.

4 Q. Now if I can, let me ask you, how does EPA
5 make the Emergency Response Policy available to the
6 public in terms of its penalty makers, was it ever
7 published in the Federal Register?

8 A. It is not.

9 Q. Was it ever put out for notice and comment in
10 any way?

11 A. No, not to the public.

12 MR. MEEDER: Now, your Honor, if I can, what
13 I would like to try, Dr. Tsai, is to summarize with the
14 court what we have talked about this morning, and
15 please help me on this.

16 In determining, first, the penalty EPA is
17 advancing here today is \$175,000 less 25 percent for
18 each of the two acetone violations.

19 Q. Is that correct?

20 A. That's correct.

21 Q. And in determining that that amount of the
22 penalty is appropriate, EPA considered first the nature
23 of the violation, in the sense that it was a reporting
24 failure, is that correct?

25 A. That's correct.

1 Q. It also considered the amount of chemicals
2 on-site, is that correct?

3 A. Not amount of chemicals on-site, but the
4 amount of chemicals that get processed or otherwise
5 used.

6 Q. Excuse me, you considered the amount of
7 chemicals processed or otherwise used, is that correct?

8 A. That's correct.

9 Q. And it also considered the size of the
10 company in terms of employees and gross sales, is that
11 correct?

12 A. That's correct.

13 Q. And with regard to all other factors, it
14 either didn't consider them, or when it considered
15 them, it dismissed them as not relevant to this issue
16 in this case, is that correct?

17 A. At the time we calculated the proposed
18 penalty, that's correct.

19 Q. And as you sit here today as well, correct?

20 A. That's correct.

21 MR. MEEDER: No further questions, your
22 Honor.

23 THE COURT: At this time we will take a
24 ten-minute recess.

25 (Recess, 10:55 a.m. to 11:07 a.m.)

1 THE COURT: We will go on the record, and I
2 will correct one thing I said.

3 I said that the name of the Form R was in
4 some sense a misnomer because it didn't deal with
5 releases, I think to the extent that it deals with the
6 negative; in other words, the form -- doesn't the form
7 require a declaration that there have been no releases,
8 is that correct, the Form R?

9 THE WITNESS: The Form R, before the
10 revision recently, they will have to provide
11 information of releases regardless of no release or a
12 release.

13 THE COURT: So it did require the negative;
14 in other words, they had to certify there were no
15 releases, right?

16 THE WITNESS: In the past they have to
17 submit the Form Rs, but in the Form Rs, they will put
18 down if there is no releases, they put down zero
19 releases as a quantity.

20 THE COURT: That's really a side point.
21 You may proceed with redirect, Mr. Jones.

22
23 REDIRECT EXAMINATION BY MR. JONES

24 Q. Dr. Tsai, on cross-examination, you were
25 asked did you investigate whether information was made

1 available to local areas, and I believe that the source
2 of that would have been Catalina Yachts.

3 Does EPCRA require that sort of an inquiry?

4 A. Can you repeat the question?

5 Q. Does EPCRA, or the regulations, require you
6 to inquire of the local community as to whether or not
7 information was made available concerning releases?

8 A. EPCRA requires the company to submit to
9 release information to EPA and to the state if they
10 have met the reporting requirements.

11 Q. Now, you were presented with documents that
12 were marked R-3, R-4 and R-5, were you not?

13 A. Yes.

14 Q. R-3 was a document that was filed with the
15 fire department, the local fire department?

16 A. That's correct.

17 Q. First let me ask you, have you ever seen
18 these documents before?

19 A. I did.

20 Q. And where did you see them?

21 A. From the case file.

22 Q. And do you know the source of those
23 documents?

24 A. I believe they were submitted to us by
25 Catalina Yachts after we issued the Complaint.

1 Q. Now with respect to R-3, is there any
2 provision in EPCRA for a document such as R-3?

3 A. No.

4 Q. Does the document presented as R-3 tell us
5 about the releases -- strike that.

6 Does the information in R-3 tell the
7 recipient about the releases in the same way as R-4, as
8 the Form R?

9 A. They are not the same. I just want to give
10 you the reason why I said they are not the same. They
11 do not provide the same information in the same form.

12 For example, in Form R, companies were
13 required to submit -- provide information about
14 releases into the air, into the water, into the land.
15 In addition, they also need to provide information
16 regarding the waste management practices on-site, or
17 where they send chemicals to off-site for treatment or
18 for recycling or for disposal. And that information is
19 not contained in R-3. R-3, in fact, only contains the
20 maximum quantity on-site, the total yearly quantity
21 used at the site, but not in terms of releases.

22 In addition from this form, we can only tell
23 that styrene was part of the component of the materials
24 used or processed at the site.

25 The community would not be able to know from

1 this form how much of the styrene or how much of
2 acetone was released to the air, to the land or to
3 water.

4 Q. Now, Dr. Tsai, in your testimony on cross,
5 you were asked how a citizen goes about finding
6 information concerning Form Rs, do you recall your
7 testimony in that regard?

8 A. Yes.

9 Q. Would the citizen find information with
10 respect to R-3 in the same places?

11 A. No. This information is not in the
12 centralized computer database.

13 Q. Now turning to R-4, is this form prescribed
14 by EPCRA?

15 A. It is not.

16 Q. And does this form present the same data as
17 Form R?

18 A. It does not. Again, the Form R presents
19 releases to the environment in terms of to the air, to
20 the water, to the land, and also has some information
21 regarding the waste management on-site, and also
22 chemicals that got sent off-site. This information
23 provided in R-4 gives us only the releases to the air,
24 and, in addition, only gives information regarding
25 organic gasses as presented on Page 2 of R-4.

1 And then there was some information regarding
2 acetone usage and emission of organic acids per year.
3 There is no information specifically telling the public
4 that there is releases of styrene on this form.

5 Q. Now, Dr. Tsai, turning to R-5, is this a
6 document that is prescribed by EPCRA?

7 A. It is not.

8 Q. And does this document provide the same
9 amount of information as the Form R to the public?

10 A. It does not provide the same information as
11 the Form R. And, also, this is not -- this information
12 is not compiled in a national database which will be
13 available to the community, to the public.

14 In this form we have information regarding
15 styrene emission, but there is no acetone emission in
16 this form. In other words, those forms only provide
17 bits of information which were required in the Form R.

18 Q. Dr. Tsai, if a citizen wants to know about
19 the information in these documents, R-4 and R-5, is it
20 accessible in the manner in which you have testified
21 regarding the Form R?

22 A. It is not accessible in the same manner.

23 Q. How would you acquire that information if it
24 is accessible?

25 A. This information, you have to submit formal

1 request to the local agencies. In the Form Rs'
2 information, you can get information through many
3 different ways; through your own computer in your own
4 home, go to the libraries, or just make a phone call to
5 a regional office, or make a request to our headquarter
6 office.

7 Q. Now you were asked on cross-examination about
8 South Coast representing the local community. Is there
9 any provision for an organization, such as South Coast,
10 to represent local interests in chemical releases?

11 A. I don't know that answer.

12 Q. You testified on cross-examination to the
13 question that South Coast represents the community, the
14 community meaning local interests. Is there a
15 provision in EPCRA for an organization, such as South
16 Coast, to represent the homeowner, the businessman and
17 other interests in the local community?

18 A. Not in EPCRA.

19 Q. What about the Los Angeles Fire Department?

20 A. Not either.

21 Q. Now on cross-examination, you were asked did
22 EPA consider any voluntary expenditures by Catalina
23 Yachts. What is the form, the voluntary expenditures
24 that EPA considers?

25 A. If Catalina, or if some companies, they

1 propose to have some supplemental environmental
2 project, EPA will consider a deduction in the penalty,
3 and that's only expenditures incurred after the Civil
4 Complaint was issued, but not before the Civil
5 Complaint was issued.

6 Q. Now, how do these supplemental environmental
7 projects get involved in the enforcement action, whose
8 idea are they?

9 A. It was EPA's idea to encourage any projects
10 which were to reduce or prevent pollution.

11 Q. Now, Dr. Tsai, you were asked on
12 cross-examination about Section 325 of EPCRA. When you
13 are preparing, when you were preparing a Complaint, is
14 it Section 325 that you follow?

15 A. That's correct.

16 Q. Do you have your -- what about the
17 Environmental Response Policy (sic)?

18 A. Enforcement Response Policy.

19 Q. I am sorry, Enforcement Response Policy?

20 A. Yes, I follow the guidelines and the entries
21 provided in Enforcement Response Policy giving -- we
22 have a statute of assessing up to \$25,000 per day per
23 violation in the statute.

24 Q. Now in calculating the civil penalty, you
25 testified with respect to the several adjustments, and

1 let's just go through those.

2 In calculating the civil penalty, did you
3 consider whether or not there were voluntary
4 disclosures?

5 A. I did consider, but it is not applicable to
6 this case because they did not voluntarily disclose
7 that information to the EPA and to the state and EPCRA.

8 Q. And do you normally make allowance for
9 voluntary disclosure, is that something you look for?

10 A. We did.

11 Q. And I am asking the question in your general
12 preparation of these documents, is this something that
13 you --

14 A. Yes, we generally consider that before we
15 prepare the proposed penalty.

16 Q. And if you find a voluntary disclosure, what
17 happens?

18 A. The penalty will be reduced before we issue
19 the Civil Complaint.

20 Q. What about a history of prior violations, did
21 you consider a history of prior violations in this
22 particular case?

23 A. Yes, we did. And it is not applicable to
24 this case because we were not aware of the history of
25 prior violations; therefore, the penalty was not

1 adjusted upward.

2 Q. What about delisted chemicals, did you
3 consider that in calculating the penalty in this case?

4 A. I did consider, but at the time of the
5 calculation and the time we issued the Complaint, both
6 acetone and styrene were listed.

7 It is only after we issued a Civil Complaint
8 that this chemical was proposed to be delisted, and was
9 delisted approximately a year after we filed the Civil
10 Complaint.

11 Q. Now with respect to attitude, did you
12 consider that when you were preparing the civil penalty
13 calculation?

14 A. I did consider that, but normally the general
15 practice in the region is to do adjustment during
16 negotiation and before we settle the case.

17 Q. Well, would you tell the Judge about whether
18 or not this element ever gets considered?

19 A. Definitely we did consider that in our
20 settlement in all cases.

21 Q. What about "Other factors as justice may
22 require"?

23 A. We also consider that, but it is not
24 considered to be applicable to this case either.

25 Q. And with respect to attitude and other

1 factors, do we ever consider those?

2 A. Yes, we did.

3 Q. Do we ever consider those?

4 A. Yes.

5 Q. And what happens?

6 A. We did consider that in some other cases and
7 reduce the penalty appropriately.

8 Q. Now ability to pay, was that considered in
9 this case?

10 A. It was considered in this case, and we
11 requested information from Catalina Yachts, and
12 Catalina Yachts declined to offer information when we
13 requested, and the ALJ made the ruling on that.

14 Q. Now, you have testified that we doctored
15 these elements and did not make adjustments, but are
16 you suggesting then that no adjustments should ever be
17 made?

18 A. Adjustment can be made I guess if you go to a
19 hearing, that will be the decision of the ALJ.

20 Q. So you are saying that while the Region
21 didn't make these adjustments, they are available to
22 the Administrative Law judge?

23 A. That's correct.

24 Q. Now there was a mention of a citizen suit.
25 Is there any relationship between the citizen suit and

1 this administrative enforcement action?

2 A. This enforcement action is not the result of
3 the citizens' group, it was the result of our own
4 inspection at the facility. We were contacted by the
5 citizen group and informed us that they have sent a
6 letter of intent to sue to Catalina Yachts. The
7 inspector, Mr. Deviny, also was informed by somebody
8 from Catalina Yachts, indicating that they received the
9 citizen suit letter of intent to sue. And it was a
10 decision between EPA and the citizen group that EPA
11 would proceed with the action.

12 Q. Now another matter that you testified on
13 cross-examination about EPA making the ERP, or the
14 document, the Enforcement Response Policy available to
15 the public.

16 Is there a customary manner in which the
17 document is made available to the public?

18 A. This document of enforcement policy,
19 Enforcement Response Policy was sent to Catalina Yachts
20 at a time that we issued the Civil Complaint.

21 Q. Is this only peculiar to Catalina Yachts?

22 A. It is not. We include in documents in all
23 the Civil Complaints we issue to all the companies we
24 issue a Civil Complaint to.

25 MR. JONES: Your Honor, may I consult with

1 my assistant?

2 THE COURT: Yes. Off the record.

3 (Discussion off the record.)

4 MR. JONES: Your Honor, I have no further
5 questions.

6 THE COURT: Thank you.

7 You may proceed with recross, Mr. Meeder.

8 MR. MEEDER: Thank you, your Honor.

9

10 RECROSS EXAMINATION BY MR. MEEDER

11 Q. In calculating the penalty in this case, as
12 presented today to the Court, do you consider yourself
13 bound by the Enforcement Response Policy, which is
14 Exhibit 2 in evidence?

15 A. We follow the guidelines for national
16 consistency.

17 Q. Do you, yourself, as an employee of EPA, feel
18 bound by that policy you must follow?

19 A. We have to follow all guidelines. If there
20 is any deviation, we have got to have good
21 justification.

22 Q. Have you ever deviated from the policy?

23 A. In a settlement?

24 Q. Not in a settlement, but in a case being
25 presented to an Administrative Law Judge, where the

1 question is what is the appropriate penalty?

2 A. No.

3 Q. Now, you testified a few moments ago on
4 redirect that the voluntary disclosure factor in the
5 policy was not applicable in this case, is that
6 correct?

7 A. That's correct.

8 Q. That's because of the way the policy defines
9 voluntary disclosure, is that correct?

10 A. That is the guidelines, the guidance provided
11 us.

12 Q. Now, does Region 9 have another policy that
13 allows it to deviate from the definition of voluntary
14 disclosure?

15 A. Not before I prepared this.

16 Q. Does it have one now?

17 A. It does.

18 Q. What is that policy?

19 A. I am not very familiar with that policy at
20 this moment.

21 Q. How long has it been in effect?

22 A. I can't remember exactly the date.

23 Q. What does -- so EPA now has a Region 9
24 policy, Region 9, as you say, has a policy with regard
25 to deviating from the voluntary disclosure definition

1 in the EPA guidance, which is Exhibit 2, is that
2 correct?

3 A. I should correct that. There is a voluntary
4 disclosure policy from EPA but not from Region 9.

5 Q. And does Region 9 today follow the definition
6 of voluntary disclosure in the R-2 exhibit, which is
7 the Enforcement Response Policy?

8 A. We follow that, but we also follow the new
9 policy EPA has, that's my understanding.

10 Q. And you don't know what that policy is?

11 A. I knew the policy, but I am not intimately
12 familiar with that policy at this moment.

13 Q. Was there a reason why it wasn't applied in
14 this case, if you know?

15 A. It was not available at that time.

16 Q. What about sitting here today, is it
17 available here today?

18 A. It is available today.

19 Q. With regard to the history of prior
20 violations, you indicated to the Court that there is
21 only an upward adjustment if there are prior
22 violations, and there is no downward adjustment for
23 first offenders, is that correct?

24 A. That's correct.

25 Q. And that is part of the Enforcement Response

1 Policy which is Exhibit R-2, is that correct?

2 A. That's correct.

3 Q. And EPA Region 9 has no policy that deviates
4 from that, is that correct?

5 A. Region 9 does not have formal policy, that's
6 correct.

7 Q. And with regard to attitude, is that the
8 policy's way of talking about degree of culpability, or
9 is it something else, is the attitude -- let me ask the
10 question this way. Strike that.

11 Put Exhibit 1 in front of you, R-1, and on
12 the second page there, going back to the subsection of
13 325(b)(1)(C), the attitude factor you testified about
14 in the policy, or the guidance, includes cooperation
15 and compliance. Where does that fall, as you
16 understand it, within the factors to be considered here
17 in Exhibit 1?

18 A. That is related to the attitude?

19 Q. Yes, where is attitude in this factor here
20 under the statute?

21 A. The statute does not have the specific words
22 of "attitude" there.

23 Q. I understand that. But where would it fall,
24 if it falls anywhere? So, is it your testimony, Dr.
25 Tsai, that the factor of attitude is not listed in the

1 statute, either in the exact words or in concept?

2 A. It is not the same.

3 Q. With regard to the statutory factor of "Other
4 factors as justice may require" -- by the way, with
5 regard to the attitude factor in the policy, it is EPA
6 Region 9's policy not to consider that other than in
7 the context of settlement discussions, is that correct?

8 A. That is our general practice, it is not a
9 policy.

10 Q. With regard to "Other matters as justice may
11 require," the policy has provisions for that, doesn't
12 it, or the guidance?

13 A. That's correct.

14 Q. Such as voluntary expenditures in connection
15 with environmental benefit, is that correct?

16 A. That's correct. But I indicated earlier it
17 was taken into consideration if the expenditures were
18 incurred prior to the issuance of the Civil Complaint
19 but not afterward.

20 Q. Is that in the policy?

21 A. Afterward but not prior to issuance.

22 Q. Is that in the policy? Page 9 of Exhibit
23 R-2, Supplemental and Environmental Projects. Do you
24 know whether or not the time reference you just gave to
25 the Court is in the policy?

1 A. I don't remember if it is information in this
2 particular guidance document, but it was met and
3 referred to other EPA guidance.

4 Q. Now with regard to Region 9, it is Region 9's
5 general practice, to use your phrase, to consider
6 supplemental and environmental projects once you get
7 past the settlement phase of an enforcement action, is
8 that correct?

9 A. You don't consider it if expenditure was
10 incurred prior to the issuance of Civil Complaint, but
11 if the expenditures were proposed and were incurred
12 after the issuance of Civil Complaint, we do take that
13 into consideration.

14 Q. In the enforcement action, not just the
15 settlement discussion, is that correct? Or is it just
16 the settlement discussions that you take that into
17 account?

18 A. We do it during the settlement discussion.

19 Q. But not after the settlement discussions have
20 broken down, is that correct?

21 A. We consider all the time, as far as that
22 expenditures will be incurred after the issuance of the
23 Complaint.

24 Q. Now if I am a citizen without a computer or
25 an Internet, in order to get a Form R information about

1 a specific company from EPA, do I have to do an FOIA?
2 What do I have to do?

3 A. You can even just make a phone call to our
4 office.

5 Q. And you will send it out?

6 A. That's correct.

7 Q. Do you know whether or not Catalina Yachts
8 has an NPDS permit?

9 A. I don't remember.

10 Q. Do you know whether or not they have any
11 discharges to water?

12 MR. JONES: Your Honor, I object to this
13 line of questioning. This is an EPCRA case, we are not
14 talking about the Clean Water Act, this witness has not
15 presented any knowledge of the Clean Water Act or
16 transactions that have taken place under the Clean
17 Water Act.

18 MR. MEEDER: Your Honor, the reason I asked
19 the question was because during redirect, Counsel for
20 EPA asked specific questions about whether or not EPCRA
21 Form R requires reporting the discharges to air, land
22 and water.

23 THE COURT: The objection is overruled.

24 You may proceed.

25 You may answer the question, if you

1 understand it.

2 MR. MEEDER: Could we have the last question
3 read to the witness? Let me rephrase the question.

4 Q. Do you know whether or not they have had any
5 discharges to the State of California or to the United
6 States?

7 A. We did not have that information.

8 Q. So in your investigation with regard to
9 whether or not the other forms -- which have been
10 marked as Exhibits R-3, R-4 and R-5 -- provided all
11 information concerning the releases by Catalina Yachts,
12 you did not investigate whether they even have to
13 report any releases to water, did you?

14 A. We did not have that information. We were
15 looking for the information required by submitting a
16 Form R.

17 Q. With regard to releases to land, do you know
18 whether or not there are any state law requirements for
19 reporting discharges or releases to land of hazardous
20 materials or chemicals?

21 A. I am not familiar with it.

22 Q. And you didn't investigate whether or not
23 Catalina Yachts has ever had a release from land of
24 hazardous materials or chemicals, did you?

25 A. I can -- no, I didn't, I can only say that

1 the information, if they were available, would be
2 scattered around all places and not in one centralized
3 location where you can get that information.

4 Q. But you don't know where the reports go, do
5 you, with regard to releases to land in Southern
6 California, is that correct, Dr. Tsai?

7 A. That's correct.

8 Q. So you can't say fairly, can you, that they
9 are scattered around, correct?

10 A. Well, it is not in the Form R, that's what I
11 meant by in a centralized location.

12 Q. Finally, Dr. Tsai, you testified on redirect
13 that -- I wanted to get this clear for the record --
14 that the adjustment factors that were not applicable,
15 or by Region 9 general policy didn't apply to this
16 case, are factors in your opinion the Administrative
17 Law Judge can consider, is that correct?

18 A. That's correct.

19 Q. And that includes, does it not, the voluntary
20 expenditures for environmental benefit, doesn't it?

21 A. If the ALJ considers it fit. Consider -- let
22 me rephrase it.

23 Q. Let me ask the question again.

24 And that includes, does it not, Dr. Tsai,
25 voluntary expenditures for benefit to the environment,